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No. 08-457

In the Supreme Court of the United States

INTERNATIONAL SHIPPING AGENCY, INC.,
PETITIONER

v.

PUERTO RICO PORTS AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether respondent Puerto Rico Ports Authority is an arm of the Commonwealth of Puerto Rico entitled to invoke the Commonwealth's immunity from a federal administrative adjudication initiated by a private complainant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 531 F.3d 868.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2008. The petition for a writ of certiorari was filed on October 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Puerto Rico Ports Authority Act, 23 L.P.R.A. §§ 331 *et seq.*, the Puerto Rico Ports Authority (PRPA) was established in 1955 as successor to the Puerto Rico Transportation Authority. PRPA is a "public corporation and government instrumentality of the Commonwealth of Puerto Rico" (Commonwealth). *Id.*

§ 333(a) (1999). It has "a legal existence and personality separate and apart from those of the Government and any officials thereof." *Id.* § 333(b). PRPA is governed by a Board of Directors—consisting of four officials of the Commonwealth government who serve in ex-officio capacity, and a private citizen nominated by the Governor—and its day-to-day operations are directed by an Executive Director appointed by the Board. *Id.* §§ 334, 335.

PRPA was created "to develop and improve, own, operate, and manage any and all types of air and marine transportation facilities and services." 23 L.P.R.A. § 336 (Supp. 2006). PRPA is authorized to "sue and be sued," to "make contracts," to acquire property "in any lawful manner" (including the exercise of eminent domain), and to dispose of property. *Id.* § 336(e), (f), (h) and (q). PRPA is authorized to make its own expenditures "without regard to the provisions of any laws governing the expenditures of public funds," *id.* § 336(d), and its "debts, obligations, contracts, [and] bonds" are those of the "government controlled corporation, and not those of the Commonwealth" or any "department" or "agent" thereof. *Id.* § 333(b) (1999). PRPA is exempt from the payment of taxes and other government fees, but instead pays the first $400,000 of its net annual income, if any, to the Commonwealth. *Id.* §§ 348(a) and (b), 354. PRPA's organic statute authorizes PRPA to "do all acts or things necessary or convenient to carry out the powers granted to it," while specifying that PRPA "shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth." *Id.* § 336(v) (Supp. 2006).

PRPA is authorized to issue its own bonds, 23 L.P.R.A. § 342(a) (1999), and may pledge "all or any

part" of its future income to secure the bonds, *id.* § 342(e)(1). Like PRPA's other debts, "[t]he bonds and other obligations issued by [PRPA] shall not be a debt of the Commonwealth" or its political subdivisions, "nor shall such bonds or other obligations be payable out of any funds other than those of [PRPA]." *Id.* § 346. If PRPA defaults on its bonds, bondholders may request the appointment of a receiver of PRPA's undertakings, who may "take possession of such undertakings * * *, and may exclude the Authority, its officers, agents, and employees * * * wholly therefrom and shall have, hold, use, operate, manage, and control the same * * * as the receiver may deem best," with the limitation that the receiver may not sell or mortgage PRPA's property. *Id.* § 343(a), (b) and (e).

In 1968, the Commonwealth legislature enacted the Dock and Harbor Act of Puerto Rico (Dock and Harbor Act), 23 L.P.R.A. §§ 2101 *et seq.* (2006). The Dock and Harbor Act gave PRPA "control of the navigation and the marine trade in navigable waters of Puerto Rico and in its harbors and docks." *Id.* § 2201. Pursuant to that Act, PRPA is empowered to regulate "navigation and marine trade," "pilot service in the harbors of Puerto Rico," and "the movement of ships, passengers and cargo," and it is authorized otherwise to administer "every part of the maritime-terrestrial zone included in a harbor zone." *Id.* §§ 2301, 2401, 2501, 2602. Under the Dock and Harbor Act, damages caused by the acts or omissions of any PRPA officer or employee "while acting in his official capacity and within the scope of his function, employment or commitment as an agent of the Government of the Commonwealth of Puerto Rico under the provisions of this chapter [*i.e.*, the Dock and Harbor Act] (in contraposition as when acting in the exercise of

the property rights of the Authority as a public corporation)," shall be the exclusive liability of the Commonwealth. *Id.* § 2303(b).

2. Since 1961, petitioner has provided stevedoring and marine terminal operator services to ocean common carriers in the Port of San Juan. In 1994, petitioner filed a complaint against PRPA before the Federal Maritime Commission (FMC or Commission), alleging that PRPA had violated the terms of a lease agreement and had extended discriminatory advantages to a competitor. C.A. App. 408. The parties settled that dispute in 1996, and a lease agreement for Piers M, N, and O reflecting that settlement was filed with the FMC in December of that year. *Id.* at 408-409.

In 2004, petitioner filed a new complaint against PRPA for, *inter alia*, alleged breach of its obligations under the Piers M/N/O agreement. Petitioner asserted that PRPA's actions violated Section 10(a)(3), (b)(10), and (d)(1), (3) and (4) of the Shipping Act of 1984, 46 U.S.C. App. 1709(a)(3), (b)(10) and (d)(1), (3) and (4), and sought damages in excess of $50 million, as well as an order directing PRPA to cease and desist its violations of the Act. C.A. App. 425-426. Two other marine terminal operators also filed complaints against PRPA before the FMC. Pet. App. 32a-33a.

PRPA moved to dismiss the complaints on the ground that it is an arm of the Commonwealth and therefore is entitled to sovereign immunity. The Commission, by a vote of 3-2, declined to dismiss the complaints. Pet. App. 30a-75a. The FMC majority recognized that PRPA's authorizing statute makes it a "public corporation and government instrumentality" and that, through the four members of the governor's cabinet who serve as ex-officio members of PRPA's five-member

board, the Commonwealth effectively controls PRPA. *Id.* at 36a, 44a. The Commission found, however, that PRPA nevertheless exercises substantial independence from the Commonwealth government. *Id.* at 44a. The FMC emphasized that the Commonwealth would not be liable for any judgment against PRPA in the complaint proceeding because Puerto Rico law provides that PRPA's debts "are those of said government controlled corporation, and not those of the Commonwealth." *Id.* at 45a-55a. It also ruled that PRPA had not shown that the actions petitioner complained of were the result of any order of the governor. *Id.* at 55a-58a. The two dissenting commissioners concluded that, in light of the Commonwealth's substantial powers over PRPA, that entity should be treated for all purposes as an arm of the Commonwealth, even though the Commonwealth would not be liable for any FMC judgment. *Id.* at 67a-68a.

3. The court of appeals reversed and directed the Commission to dismiss the complaints. Pet. App. 1a-29a. The court first observed that, under circuit precedent that the parties did not challenge, the Commonwealth enjoys the same immunity pursuant to the Puerto Rican Federal Relations Act, 48 U.S.C. 734, that States possess by virtue of the Eleventh Amendment. Pet. App. 6a & n.1. The court therefore found it unnecessary to decide whether the Commonwealth enjoys immunity as a constitutional matter. See *id.* at 6a n.1.

In determining that PRPA was immune from an FMC proceeding initiated by a private party, the court of appeals started from the proposition that "an entity either is or is not an arm of the State." Pet. App. 8a. The court held that the proper inquiry involves consideration of three factors: "(1) the State's intent as to the status of the entity, including the functions performed

by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." *Ibid.*

The court found several indicia that the Puerto Rico government intended to make PRPA an arm of the Commonwealth. Those included the statutory designation of PRPA as a "government instrumentality" and "government controlled corporation," Pet. App. 11a-12a; PRPA's role in the development and management of marine and terminal facilities, which it is to conduct for the benefit of the public, *id.* at 12a-13a; the Commonwealth's decision to apply various administrative procedure and civil service laws to PRPA and to review PRPA's finances, *id.* at 13a-14a; and the amicus brief of the Commonwealth arguing that PRPA is an arm of the Commonwealth, *id.* at 14a-15a (quoting 23 L.P.R.A. § 333(a) and (b) (1999)).

With respect to government control, the court noted that four of the five members of PRPA's Board of Directors are cabinet members whom the governor may remove from their cabinet positions at will, and that the fifth is a private citizen appointed to the Board by the governor. Pet. App. 16a-17a. The court further observed that the board appoints PRPA's executive director and that the current executive director is the Commonwealth's Secretary of State. *Id.* at 17a. The court of appeals relied as well on a 1992 opinion of the Puerto Rico attorney general that the governor retains control of public corporations, and on evidence of the governor's orders to PRPA management with respect to redeveloping the port for tourism in the area of Old San Juan. *Id.* at 17a-18a.[1]

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[1] The court referenced the redevelopment of San Juan's waterfront as "the facts in this case," Pet. App. 18a, but it does not appear from pe-

As to PRPA's effect on the Puerto Rico treasury, the court determined that it "must consider the entity's overall effect," "not whether the State would be responsible to pay a judgment *in the particular case at issue.*" Pet. App. 18a-19a. While acknowledging that PRPA's organic statute generally makes PRPA's debts separate from those of the Commonwealth, the court observed that the Dock and Harbor Act, 23 L.P.R.A. § 2303 (2006), renders the Commonwealth liable for certain torts committed by PRPA employees. Pet. App. 20a-21a. The court viewed that provision as establishing that PRPA's actions do affect the Commonwealth's treasury in some circumstances. *Id.* at 21a-22a.

The court of appeals recognized (Pet. App. 10a n.3) an apparent conflict between its holding and that of the First Circuit in *Royal Caribbean Corp.* v. *PRPA*, 973 F.2d 8 (1992). In *Royal Caribbean*, the First Circuit concluded that PRPA's status as an arm of the Commonwealth depended upon the particular activity at issue in a given case, see *id.* at 9, and it held that PRPA was not entitled to immunity in the case before it, see *id.* at 10-12. The D.C. Circuit in this case concluded, however, that the First Circuit had "expressly departed from that narrow focus" in its subsequent decision in *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp* , 322 F.3d 56, cert. denied, 540 U.S. 878 (2003).

Judge Williams concurred in the majority's opinion but wrote separately to note his disagreement with this Court's more recent arm-of-the-State analysis. Pet. App. 24a-29a. In his view, the test that the Court had

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titioner's complaint before the FMC that its claims arise out of the redevelopment project, see p. 4, *supra*.

applied until recently—under which a state-created separate legal personality, with authority to sue and be sued, did not enjoy the State's immunity—was both more sound doctrinally and more easily administrable. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-17) that the court of appeals erred in holding that PRPA is immune from the FMC's jurisdiction over petitioner's complaint. That question does not warrant this Court's review at this time. Although the decision below conflicts with a prior ruling of the First Circuit holding that PRPA is not an arm of the Commonwealth entitled to sovereign immunity when PRPA acts in a proprietary capacity, *Royal Caribbean Corp.* v. *PRPA*, 973 F.2d 8 (1992), it is unclear whether the First Circuit will adhere to the approach it took in *Royal Caribbean* in light of intervening decisions of this Court and of the First Circuit itself. Until the First Circuit clarifies its current understanding as to PRPA's susceptibility to FMC adjudication of private complaints, review by this Court would be premature.

1. Through the first part of the 20th century, this Court held that a State-created instrumentality established as "a separate legal person, with the capacity to sue and be sued," should be treated as an "entit[y] apart from the state itself" that could not assert the State's sovereign immunity from private suits. Pet. App. 24a (Williams, J., concurring); see *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922); *Hopkins* v. *Clemson Agric. Coll.*, 221 U.S. 636, 645 (1911); *Barnes* v. *District of Columbia*, 91 U.S. (1 Otto) 540, 544-545 (1876); *Bank of the Com-*

monwealth of Ky. v. *Wister*, 27 U.S. (2 Pet.) 318, 323 (1829). More recently, however, the Court has adopted a multi-factor analysis to determine whether an entity is an "arm of the State" and therefore enjoys the State's immunity. See, *e.g.*, Pet. App. 26a-29a (Williams, J., concurring); *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-51 (1994); *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979); *Mount Health City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280-281 (1977).

The courts of appeals have identified various factors that are potentially relevant to the determination whether a particular entity is an "arm of the State." In this case, the court of appeals identified three such factors: "(1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury." Pet. App. 8a. Cf. *Fresenius Med. Care Cardiovascular Res., Inc.* v. *Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 65 n.7 (1st Cir.) (identifying four factors, the first corresponding to the D.C. Circuit's second factor, the second and third corresponding to the D.C. Circuit's first factor, and the fourth corresponding to the D.C. Circuit's third factor), cert. denied, 540 U.S. 878 (2003); *Ristow* v. *South Carolina Ports Auth.*, 58 F.3d 1051, 1052 (4th Cir.) (identifying six factors, the first and fifth of which correspond to the D.C. Circuit's first, the fourth and sixth of which correspond to the D.C. Circuit's second, and the second and third of which correspond to the D.C. Circuit's third), cert. denied, 516 U.S. 987 (1995).

Under the multi-factor approaches used by the courts of appeals, the question whether a particular en-

tity is an "arm of the State" cannot be resolved through application of a bright-line rule, and courts may reach different conclusions with respect to entities that are similar in significant ways. See, *e.g.*, *Ristow*, 58 F.3d at 1053-1054 (distinguishing the South Carolina Ports Authority from the port authority at issue in *Hess* on the ground that South Carolina had issued $132 million in general obligation bonds, to be repaid from the State's general tax revenues, for improvements to the ports). This Court does not normally grant certiorari to review an appellate court's application of settled principles to the facts of a particular case. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioner argues that the court of appeals' decision conflicts with that of the First Circuit in *Royal Caribbean*, both with respect to the status of PRPA in particular and with respect to the proper methodology for resolving "arm of the State" disputes more generally. Petitioner contends (Pet. 6-10) that, whereas the D.C. Circuit held in this case that an entity must be an "arm of the State" for all purposes or for none, the First Circuit and other courts of appeals have held that an entity's status as an "arm of the State" may depend on the particular function that gave rise to the suit. This Court's review of those questions would be premature at the present time.

a. In *Royal Caribbean*, the First Circuit considered whether PRPA was immune from suit on a claim "that it negligently maintained Pier No. 6 in San Juan Harbor." 973 F.2d at 9. In an earlier case, the First Circuit had

determined that PRPA was entitled to immunity as an arm of the Commonwealth with respect to a claim asserting PRPA's *respondeat superior* liability for the negligence of a harbor pilot based on PRPA's control over pilot service pursuant to the Dock and Harbor Act, 23 L.P.R.A. §§ 2401, 2412 (2006). *Puerto Rico Ports Auth.* v. *M/V Manhattan Prince*, 897 F.2d 1, 10-12 (1990). In *Royal Carribean*, the First Circuit held that the "arm of the State" inquiry must be conducted "in respect to the particular 'type of activity' by the Ports Authority that is the object of the plaintiffs' claim." 973 F.2d at 9 (quoting *M/V Manhattan Prince*, 897 F.2d at 10). The court determined that PRPA was not entitled to immunity in *Royal Carribean* because the tasks of "running and maintaining the docks" were "not 'governmental' but 'proprietary,' rather like those of a private company that manages an office building and charges tenants for its services." *Id.* at 10. In addition to the nature of the activity at issue, the court stressed that PRPA was financially independent of the Commonwealth—that PRPA, and not the Commonwealth, would pay any judgment, that PRPA did not depend on the Commonwealth for its funding, and that PRPA's debts were not those of the Commonwealth—and that PRPA "operates with a considerable degree of autonomy." *Id.* at 10-11.

The court of appeals in this case recognized the apparent conflict with *Royal Carribean* but indicated that First Circuit decisions subsequent to *Hess* reflected a different approach. Pet. App. 10a. In *Fresenius*, the First Circuit undertook a comprehensive review of this Court's more recent Eleventh Amendment jurisprudence and determined that those intervening decisions required the court of appeals to "refine[]" its pre-*Hess*

analysis. 322 F.3d at 68. Because the First Circuit has not considered PRPA's status in light of this Court's most recent Eleventh Amendment decisions, it is unclear whether any square circuit conflict currently exists on the question whether PRPA is immune from the FMC adjudication at issue in this case.

b. Petitioner further contends that the court of appeals' decision conflicts with those of other circuits on the broader question whether an entity's status as an "arm of the State" can vary "depending on the claims and activities involved in the case." Pet. 6; see Pet. 6-10. This Court has not directly addressed the question whether an entity's status as an "arm of the State" can "change from one case to the next" (Pet. App. 8a) based on the nature of the function that gives rise to the suit. In *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), however, the Court considered the conceptually related question whether an "arm of the State" may be subject to private damages suits for conduct that is proprietary in nature. In his dissenting opinion in *College Savings Bank*, Justice Breyer (who as Chief Judge of the First Circuit was the author of *Royal Caribbean*) concluded that even an entity that was assumed to be an "arm of the State," see *id.* at 691 (Stevens, J., dissenting), should not be afforded immunity for "ordinary commercial activity" akin to that of a private participant in the marketplace, *id.* at 699 (Breyer, J., dissenting). The Court, however, rejected the contention that "state sovereign immunity is any less robust where" the conduct at issue "is traditionally performed by private citizens and corporations," *id.* at 684.

The decision in *College Savings Bank* does not foreclose the possibility that a State may choose to create an

entity that is an "arm of the State" for some purposes but not for others. Respondent PRPA concedes that "[n]othing in the decision below imposes any limits on the states' *ability* to create entities that expressly enjoy sovereign immunity for some purposes but not others." PRPA Br. 12. Similarly, numerous court of appeals decisions recognize the possibility that a political subdivision or official that is not "an arm of the State" may be immune from suits challenging the performance of actions taken as a state agent. See Pet. 8-10 (citing cases); PRPA Br. 12 n.3 (same). When presented with the issue again, the First Circuit may conclude, consistent with its holdings in *Royal Caribbean* and *M/V Manhattan Prince*, that PRPA is not an arm of the Commonwealth as a general matter, as reflected in PRPA's organic statute, but that it is entitled to assert the Commonwealth's immunity when it acts in a regulatory capacity under the specific authority of the Dock and Harbor Act.[2] For the reasons discussed above, however, the Court should not

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[2] The court of appeals treated PRPA's organic statute and the Dock and Harbor Act as equally relevant to the determination whether PRPA is an "arm of the State." See Pet. App. 11a-22a. PRPA's brief in opposition further confuses the issue by citing indiscriminately to sections of the organic statute and of the Dock and Harbor Act as though they were contained within the same enactment. See, *e.g.*, PRPA Br. 3-4. PRPA also states, without qualification, that "an action alleging fault or negligence against PRPA acting as an agent of the Commonwealth must be brought against the Commonwealth itself." *Id.* at 4 (citing 23 L.P.R.A. § 2303(b) (2006)). The cited provision, however, is expressly limited to actions taken by PRPA officials or employees "under the provisions of this chapter," *i.e.*, the Dock and Harbor Act, and it specifically states that the Commonwealth's liability does *not* extend to acts taken by PRPA or its officers "in the exercise of the property rights of the Authority as a public corporation." 23 L.P.R.A. § 2303(b) (2006).

grant certiorari to decide that question until the First Circuit has reconsidered its *Royal Carribean* decision in light of this Court's most recent precedents.

c. The question whether PRPA is an arm of the Commonwealth, either in general or in its performance of particular functions, can easily be raised again before the First Circuit, which has general appellate jurisdiction over cases arising from the United States District Court for the District of Puerto Rico. 28 U.S.C. 41. Indeed, if the FMC dismisses a future complaint against PRPA in accordance with the D.C. Circuit's ruling in this case, a disappointed claimant that resides in Puerto Rico can seek review of that decision in the First Circuit. See 28 U.S.C. 2343 (petition for review from an FMC order may be filed in the D.C. Circuit or in "the judicial circuit in which the petitioner resides or has its principal office"). Because it is as yet uncertain how the First Circuit will resolve that issue in light of this Court's more recent Eleventh Amendment decisions, review by this Court is unwarranted at this time.

3. An additional consideration counseling against review is the fact that the petition presents a question concerning the proper application of the Eleventh Amendment in a case in which the Eleventh Amendment applies only indirectly, if at all. In determining that PRPA was immune from the FMC's adjudication of a private complaint, the court of appeals did not decide whether arms of the Commonwealth are entitled to immunity under the Eleventh Amendment. See Pet. App. 6a n.1. Rather, consistent with the agreement of the parties and with governing circuit precedent, see *Rodriguez* v. *Puerto Rico Fed. Affairs Admin.*, 435 F.3d 378, 381-382 (D.C. Cir.), cert. denied, 549 U.S. 812 (2006), the court treated the Puerto Rican Federal Relations Act,

48 U.S.C. 734, as granting the Commonwealth "the same sovereign immunity that the States possess" under the Eleventh Amendment, Pet. App. 6a.

This Court has expressly reserved decision on the question whether Congress intended "the Commonwealth of Puerto Rico is to be treated as a State for purposes of the Eleventh Amendment." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). Because petitioner has not raised that issue, the Court would not normally address it in this case. In light of the canon of constitutional avoidance, however, the better course would be for the Court to resolve the statutory question, in a case that presents the issue, before reaching a constitutional issue that might otherwise be avoided.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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